

NO. 82-1633

MAY 16 1983

IN THE  
**Supreme Court of the United States**

OCTOBER TERM, 1982

HOSPITAL BUILDING COMPANY,  
*Petitioner,*

vs.

TRUSTEES OF THE REX HOSPITAL,  
a Corporation; JOSEPH BARNES;  
and RICHARD URQUHART, JR.,  
*Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI  
TO THE UNITED STATES COURT OF APPEALS  
FOR THE FOURTH CIRCUIT

REPLY BRIEF FOR PETITIONER

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## TABLE OF CONTENTS

	Page
I. THE FOURTH CIRCUIT'S DECISION IS APPROPRIATE FOR REVIEW BY THE COURT AT THIS TIME. ....	2
II. THE FOURTH CIRCUIT'S DECISION, BY CREATING A NEW SPECIAL RULE OF REASON AFFIRMATIVE DEFENSE, RAISES ISSUES OF NATIONAL IMPORTANCE UNDER THE SHERMAN ACT. ....	4
III. CONCLUSION. ....	10
APPENDIX:	
A. Excerpts from Trial Testimony of George Stockbridge. ....	1a

## TABLE OF AUTHORITIES

Cases	Page
<i>American Construction Co. v. Jacksonville, Tampa &amp; Key West Ry.</i> , 148 U.S. 372 (1893).....	2
<i>Arizona v. Maricopa County Medical Society</i> , 102 S.Ct. 2466 (1982).....	10
<i>Brotherhood of Locomotive Firemen &amp; Enginemen v. Bangor &amp; Aroostook R.R.</i> , 389 U.S. 327 (1967)....	2
<i>Hamilton-Brown Shoe Co. v. Wolf Brothers &amp; Co.</i> , 240 U.S. 251 (1916).....	2
<i>National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City</i> , 452 U.S. 378 (1981) .....	6, 8, 9
<i>National Society of Professional Engineers v. United States</i> , 435 U.S. 679 (1978).....	10
<i>Silver v. New York Stock Exchange</i> , 373 U.S. 341 (1963).....	7, 8, 9
<i>United States v. National Association of Securities Dealers</i> , 422 U.S. 694 (1975).....	7
<i>United States v. Socony-Vacuum Oil Co.</i> , 310 U.S. 150 (1940).....	10
<b>Other</b>	
Public Health Service Act of 1967, <i>codified at</i> 42 U.S.C. § 246(a)(2)(B) and (I) (1976) .....	6
R. Sterne & E. Gressman, <i>Supreme Court Practice</i> , (5th ed. 1978) .....	2, 3, 4

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**REPLY BRIEF FOR PETITIONER**

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Respondents have endeavored to shield this case from timely review by the Court through attempts to characterize the petition for certiorari as procedurally premature and the Fourth Circuit's decision as substantively trivial. Respondents thereby misconceive two basic certiorari considerations: (i) it is entirely appropriate for the Court to grant certiorari to review the Fourth Circuit's expanded concept of "implied immunity" from the antitrust laws where that concept will, if not overturned, govern the re-trial of this case and (ii) the Fourth Circuit's unprecedented and confusing "special rule of reason"

affirmative defense to *per se* violations is a defense that is destined, if not overturned, for use not only if this case is retried but also in countless future actions that involve *per se* violations of the antitrust laws.

# **I. THE FOURTH CIRCUIT'S DECISION IS APPROPRIATE FOR REVIEW BY THE COURT AT THIS TIME.**

It is abundantly clear that the dispositive issue in this case is whether, the matter having already been tried to a jury under the *per se* doctrine, it is necessary to re-try the case to permit respondents to assert the Fourth Circuit's "good faith" rule of reason affirmative defense. It is equally clear that the re-trial ordered by the Fourth Circuit for the purposes of permitting such a defense creates a precedent for all future antitrust cases involving "planning" activities of any type. The Fourth Circuit's decision thus presents an "important" and "clear-cut" issue of law. Under these circumstances, it is appropriate for the Court to hear this case at this juncture. See R. Stern & E. Gressman, *Supreme Court Practice*, §4.19 at 301 (5th ed. 1978).

Respondents assert, however, that the "long-standing principle that the Court 'should not issue a writ of *certiorari* to review a decree of the Circuit Court of Appeals on appeal from an interlocutory order,' " mitigates against review by the Court. Opp. Brief at 16. That principle has absolutely no bearing on the Court's decision to grant *certiorari* in this case. Unlike the cases cited by respondents,<sup>1</sup> there has already been a trial on the merits here.

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<sup>1</sup> See *American Construction Co. v. Jacksonville, Tampa & Key West Ry.*, 148 U.S. 372 (1893); *Brotherhood of Locomotive Firemen & Enginemen v. Bangor & Aroostook R.R.*, 389 U.S. 327, 328 (1967); *Hamilton-Brown Shoe Co. v. Wolf Brothers & Co.*, 240 U.S. 251 (1916).

Reversal of the Fourth Circuit's decision would terminate this dispute because the jury's verdict would be reinstated. The introduction of evidence with respect to respondents' good faith in order to "complete" the record, will not provide additional guidance in deciding which rule of law should govern this case.

Contrary to respondents' assertion (Opp. Brief at 17), the Court does review the type of federal court judgment involved here where "there is some important and clear-cut issue of law that is fundamental to the further conduct of the case and that would otherwise qualify as a basis for certiorari." Stern & Gressman, *supra*, at 301. Respondents therefore miscite Eugene Gressman, counsel for petitioner, for the proposition that the "Supreme Court will not usually grant certiorari to review a non-final judgment, such as one remanding the case to the district court for a new trial. . . ." Opp. Brief at 17 quoting Stern & Gressman, *supra*, at 300. Had respondents consulted the next page of Stern & Gressman, they would have learned that the Court does grant certiorari to review "important and clear-cut" issues of law.<sup>2</sup> Certainly the Fourth Circuit's promulgation of an unprecedented standard for assessing the legality of anti-competitive conduct under the antitrust laws represents such an issue.<sup>3</sup>

<sup>2</sup> Had respondents consulted page 53 of Mr. Gressman's text, they would also have learned that "[a]s long as the jurisdiction of the court of appeals has properly been invoked and a timely petition for certiorari is filed, the Supreme Court has jurisdiction to take the case whatever its status in the lower courts." (Emphasis supplied.)

<sup>3</sup> Respondents also pretend that "the Fourth Circuit reversed and remanded for a new trial on three independent grounds of which Plaintiff identifies only one as a reason for granting certiorari." Opp. Brief at 11. The Fourth Circuit did *not*, however, find reversible error with regard to either the *Noerr-Pennington* issue or the issue

## II. THE FOURTH CIRCUIT'S DECISION, BY CREATING A NEW SPECIAL RULE OF REASON AFFIRMATIVE DEFENSE, RAISES ISSUES OF NATIONAL IMPORTANCE UNDER THE SHERMAN ACT.

Respondents' assertion that this case "represents the application of well-settled legal principles in a judgment concerning out-of-date federal legislation" (Opp. Brief at 15) is a classic misstatement. The "special rule of reason" defense created by the Fourth Circuit in no way reflects "well-settled legal principles" of antitrust law. Further, the so-called "out-of-date" federal health care legislation, which the Fourth Circuit could not find clearly repugnant to the Sherman Act, has not been replaced by legislation that creates such a repugnancy. The critical fact remains that no federal health care planning legislation, past or present, mandates conduct that would otherwise violate the Sherman Act.

Respondents' participation in planning for the needed health care facilities in the Raleigh market is not the subject of this lawsuit. Rather, respondents were found liable by the jury for preventing petitioner's entry into the Raleigh market, *i.e.*, horizontal market allocation, and for their conspiracy with Blue Cross to refuse to deal with petitioner.<sup>4</sup>

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involving the co-conspirator status of Assistant Attorney General Denson. That court's observations on these issues were simply in the context of "additional issues . . . relevant to a new trial" and were addressed only because the court had already—erroneously—ordered "the matter [to] be retried" in light of the special rule of reason which the court had formulated. 691 F.2d at 686-7; Pet. at 13a. In any event, petitioner properly preserved those issues for the Court's consideration. See Pet. at ii and Stern & Gressman, *supra*, at §6.27 at 462-3.

<sup>4</sup> Petitioner proved at trial that respondents' conspiracy included the scheme under which respondents conspired with Blue Cross in

It is beyond question that there was a need for additional hospital beds in Raleigh,<sup>5</sup> approximately 100 of which could—and would—have been quickly provided by petitioner had it not been for respondents' conspiracy. Thus, the reason that respondents objected to the expansion of petitioner's Mary Elizabeth Hospital was not that the additional beds planned by Mary Elizabeth were unnecessary or "duplicative" but that respondents had not allocated, in their conspiracy, any of the needed beds to petitioner and that Mary Elizabeth's proposed expansion would operate to the competitive detriment of Rex and Wake Memorial. George Stockbridge, director of the Health Planning Council, conceded as much at trial. (V 2164-5). See Appendix A hereto which consists of pertinent excerpts from Mr. Stockbridge's trial testimony.

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order to make it unprofitable for petitioner to expand Mary Elizabeth. (VII 2617, 2635, 2648, 2653, 2855). Respondents' assertion to the contrary (Opp. Brief at 10-11) is based on incredible misreadings and misstatements to the record. For example, respondents erroneously contend (Opp. Brief at 10) that Mr. John W. Moffitt, the director and vice president of provider relations for Blue Cross, testified at IV 1382-83 that Blue Cross's reimbursement policies with respect to for-profit and not-for-profit hospitals were the same. In fact, Mr. Moffitt's testimony referred to only one aspect of Blue Cross's reimbursement policy for *proprietary* hospitals (see IV 1380-1382) and in no way referred to Blue Cross's reimbursement policy to not-for-profit hospitals. Further, respondents' own record citations demonstrate that Blue Cross's discrimination against petitioner was the product of a conspiracy among Blue Cross and the respondents that was effectuated, among other ways, through a system of interlocking directorates. See V 1941. Respondents' other misrepresentations with respect to their conspiracy with Blue Cross will be dealt with more fully in petitioner's brief in opposition to respondents' cross-petition for certiorari.

<sup>5</sup> The only "plan" which was contemplated by federal health care legislation—North Carolina's "state plan"—found that there was a need for at least 409 additional hospital beds in the Raleigh area. (VII 2830).

As the brief in opposition inadvertently demonstrates, there were no statutes then in effect which authorized respondents' market allocation or refusal to deal conspiracies. *No* statute cited by respondents authorized or required them to combine, under the auspices of any organization, to allocate the additional medical-surgical beds which were necessary for an expanding market. *No* statute cited by respondents authorized or required them to "enforce" this allocation by conspiring to (i) oppose petitioner's attempts to obtain the requisite state approval of its proposed expansion by abusing the procedures for obtaining a certificate of need or (ii) discriminate in insurer reimbursement against petitioner and other proprietary hospitals. *No* statute cited by respondents subjected their conduct to scrutiny for anticompetitive consequences.<sup>6</sup> See *National Gerimedical Hospital and Gerontology Center v. Blue Cross of Kansas City*, 452 U.S. 378, 390 (1981).

None of the health care statutes in place at the time of respondents' conspiracy, *or in place at the present time*,

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<sup>6</sup> The most that respondents demonstrate is that certain federal statutes that provided for some federal funding contemplated creation of health planning organizations such as the Health Planning Council. Opp. Brief at 2-3. There is nothing in the record, however, to support the contention that the Health Planning Council was organized or funded pursuant to that legislation. Rather, the Health Planning Council was organized on the initiative of local citizens and local governments and funded primarily by them. (II 430-31, 508-09). Moreover, the health planning councils were not created as vehicles for industry self-regulation or to allocate needed health care facilities. Respondents compound their mischaracterization of federal health care statutes by severely mischaracterizing the scope and purpose of "the 1967 Amendments to the 1966 Act." Opp. Brief at 5-6 quoting 42 U.S.C. §246(a)(2)(I) (1976). The 1967 amendments, which were nowhere "relied on" by the Fourth Circuit, provide only that local health planning agencies, such as the Health Planning Council, might *advise* state health planning agencies. See 42 U.S.C. §246(a)(2)(B) (1976). Those amendments do *not*, in contrast to respondents' erroneous contentions, mandate any affirmative conduct by local health planning agencies.

envisioned—let alone authorized—respondents' perversion of the planning process into a horizontal market allocation scheme or a refusal to deal. Only if health care statutes, past or present, authorized private persons to agree on the allocation of health care activities could there be a "clear repugnancy" between the health care regulatory system and the antitrust laws. Because even the current health care statutes create no such repugnancy, the special rule of reason affirmative defense created by the Fourth Circuit can as easily be applied under the current statutes as under the statutes in place when respondents' conspiracy occurred.

*Silver v. New York Stock Exchange*, 373 U.S. 341 (1963), much relied upon by respondents, dealt with an underlying statutory scheme that gave full power of self-regulation, with all that implies, to private securities exchanges. In *Silver*, this Court held that conduct which was mandated by a self-regulatory scheme imposed by other federal legislation and which would otherwise be a *per se* violation of the Sherman Act, should be analyzed under the rule of reason. 373 U.S. at 360. However, only a "convincing showing of *clear repugnancy* between the antitrust laws and the regulatory system" justifies such implied antitrust immunity. *United States v. National Association of Securities Dealers*, 422 U.S. 694, 719-20 (1975) (emphasis supplied).<sup>7</sup> In contrast the only activity "envisioned," contemplated or authorized by the statutes involved in this litigation was funding for planning councils to assess local health care needs. Those statutes did

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<sup>7</sup> "Repeal is to be regarded as implied only if *necessary to make the [other federal law] work*, and even then only to the minimum extent necessary. This is the guiding principle to reconciliation of the two statutory schemes." *Silver*, 373 U.S. at 357 (emphasis supplied).

not require anyone to engage in health care planning and certainly did not mandate implementation of any plan to allocate needed health care facilities in a given market, particularly to the exclusion of a competitor that was immediately able to help meet local health care needs.

The Fourth Circuit's decision did call upon *Silver* for indirect support for its departure from the *per se* standard, 691 F.2d at 685, Pet. at 10a, but that court failed to employ the implied repeal analysis required by *Silver*. Instead, the Fourth Circuit devised a new analytical framework based upon what it thought Congress might have intended. Respondents' contention that the Fourth Circuit "faithfully adhered" to *Silver* is thus in error. Opp. Brief at 1.

In lieu of the "clear repugnancy" test set forth in *Silver* and consistently adhered to in other cases, the Fourth Circuit substituted a much less exacting standard. It provided for an implied immunity from the antitrust laws because it believed that Congress had "envisioned" participation by hospitals and administrators in the planning of health care facilities. But nowhere in its opinion did the Fourth Circuit find that an implied repeal was necessary to make any of the referenced federal health care legislation work, and clearly it is not. *National Gerimedical* reiterated, but did not alter, the implied repeal analysis in *Silver*. See 452 U.S. at 388-93. Accordingly, footnote 18 of *National Gerimedical* does not provide precedent for the Fourth Circuit's implied immunity analysis.<sup>8</sup> See Pet. at 15.

<sup>8</sup> Because the Fourth Circuit did not adhere to the *Silver* analysis reiterated in *National Gerimedical*, the "participation by private health care providers" which it endorsed could not be "identical in principle" (Opp. Brief at 24) to the "cost-saving" cooperation among providers which the Court suggested, in footnote 18 of *National Gerimedical*, might be immune from normal application of the anti-trust laws.

Respondents' attempts to maintain that the courts should ask if they were acting in "good faith" when they engaged in their market allocation and refusal to deal schemes misses the point of *Silver*. Whether conduct that is a *per se* violation of the antitrust laws can be justified at all is deferred, under *Silver*, until *after* a finding that an implied repeal is necessary to make the statutory scheme work. 373 U.S. at 357. The Fourth Circuit never made that preliminary assessment, and no amount of evidence with respect to respondents' alleged "good faith" will assist any court in making that essential and purely legal determination. Thus, the Fourth Circuit did not even begin to analyze the federal health care legislation with the care or depth required to determine if the implied immunity principles set forth in *Silver* and *National Geri-medical* were satisfied.

The new doctrine of antitrust law created by the Fourth Circuit's decision applies to any field in which federal legislation in any way regulates market entry or contemplates planning activities. Under the Fourth Circuit's decision, any antitrust defendant would be free to argue that his anticompetitive conduct was carried out in good faith under some congressional policy. Not only would statutes that permit private "planning" encourage arguments of this variety, but other equally modest expressions of congressional doubt about the benefits of vigorous competition could be used to justify exemption from normal operation of the antitrust laws.<sup>9</sup> The Court has

<sup>9</sup> Respondents argue that because the statutes cited in the Fourth Circuit's opinion were "replaced" by the 1974 statute (Opp. Brief at 2, 15) this case could not occur again. The opposite is true. If the Fourth Circuit could build upon the thin reeds of encouragement for health care planning found in the statutes it cited, other federal courts can even more easily seize upon the stronger statutory planning or "regulatory" provisions in more recent statutes to carry forward the Fourth Circuit's unprecedented doctrine.

consistently rejected such a case-by-case approach to naked restraints of trade which have long been forbidden by the antitrust laws. See, e.g., *Arizona v. Maricopa County Medical Society*, 102 S.Ct. 2466 (1982); *National Society of Professional Engineers v. United States*, 435 U.S. 679 (1978); *United States v. Socony-Vacuum Oil Co.*, 310 U.S. 150, 224, n.59 (1940).

### III. CONCLUSION.

The respondents fail in their attempt to rewrite the Fourth Circuit's opinion and to trivialize the significance of that Court's special rule of reason affirmative defense. The petition for writ of certiorari raises important, far-reaching issues and should be granted.

Respectfully submitted,

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Dated: May 17, 1983

## **APPENDIX A**

### **Trial Testimony of George Stockbridge**

**Question**  
(by Mr. Donnelly—  
counsel for  
respondents)

Do you know the reason or reasons that the Health Planning Council decided to recommend that Hospital Building Company's operating as Mary Elizabeth Hospital, application for a certificate of need be denied?

**Answer**  
(by Mr. Stockbridge)

Yes.

**Question**  
(by Mr. Donnelly)

What were those reasons?

**Answer**  
(by Mr. Stockbridge)

Well, the first reason, I suppose, would be that the proposed hospital, replacement and expansion project for Mary Elizabeth, had not been a part of, or incorporated into the planning that had been going on by the Joint Long-Range Planning Committee of Wake County in the last year or two.

Secondary to that reason, was the concern that this unplanned expansion of this nature would have serious financial impact upon the other local hospitals, and indeed, could threaten their continued operation and the realization of their own plans for expansion and replacement.

(V 2164-5)